

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 DELUX PUBLIC CHARTER, LLC d/b/a JSX  
AIR and JETSUITEX, INC., XO GLOBAL,  
LLC; and BLADE URBAN AIR MOBILITY, INC.,

5 Plaintiffs,

6 Case No. 22-cv-01930

7 -vs-

8 COUNTY OF WESTCHESTER, NEW YORK, a  
charter county; APRIL GASPARRI, in her  
official capacity as AIRPORT MANAGER;  
9 and AVPORTS, LLC,

10 Defendants.

11 -----x  
12 United States Courthouse  
White Plains, New York

13 March 11, 2022

14 \*\* VIA TELECONFERENCE \*\*

15 B e f o r e:

16 HONORABLE PHILIP M. HALPERN  
United States District Judge

17 A P P E A R A N C E S:

18 TROUTMAN, PEPPER, HAMILTON, SANDERS, LLP

19 Attorneys for Plaintiffs

20 BY: STEVEN D. ALLISON  
JOHN N. THOMAS

21 WESTCHESTER COUNTY ATTORNEY

22 LAW DEPARTMENT

23 Attorneys for Defendant, County of Westchester

24 BY: JOHN NONNA  
DAVID H. CHEN

25 \*Proceedings recorded via digital recording device\*

1 A P P E A R A N C E S: (CONT.)

2 THE FOONT LAW FIRM, LLC

3 Attorneys for Defendant, AvPorts, LLC and April Gasparri  
BY: BRIAN E. FOONT

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1                   THE DEPUTY CLERK: Delux Public Charter, LLC, et al.  
2 against the County of Westchester, New York, et al.

3                   Would the plaintiffs please note your appearance?

4                   MR. THOMAS: Yes. Good morning. This is Jack Thomas  
5 of Troutman, Pepper for the plaintiffs. Also on the phone is my  
6 partner, Steven Allison.

7                   MR. ALLISON: Good morning, Your Honor. Steven  
8 Allison, Troutman Pepper, for the plaintiffs.

9                   THE COURT: Good morning, counsel.

10                  MR. NONNA: For Westchester County, Westchester County  
11 Attorney John Nonna.

12                  MR. CHEN: And also for Westchester County, Deputy  
13 County Attorney David Chen.

14                  MR. FOONT: And AvPorts and April Gasparri, Brian  
15 Foont.

16                  THE COURT: All right. Counsel, good morning.

17                  ALL COUNSEL: Good morning, Your Honor.

18                  THE COURT: I feel like a little bit like the lawyers  
19 are pushing a big pile of stuff my way, and I want to start by  
20 -- let's try to simplify what's going on here for a moment.

21                  First of all, Mr. Foont, are you admitted to the bar  
22 in the Southern District?

23                  MR. FOONT: I am, Your Honor.

24                  THE COURT: All right. So then you know that you got  
25 to look at my rules, and you got to make an appropriate motion,

1 and your motion under Rule 21 is inappropriate. So I am just  
2 going to deny it without prejudice.

3                   However, Mr. Allison, Mr. Thomas, why do we need  
4 AvPorts and April Gasparri? The County is the offender  
5 according to your complaint, right? And April Gasparri, airport  
6 manager, and AvPorts, LLC have nothing whatsoever to do with  
7 this. They are employees or agents of the County; am I right?

8                   MR. ALLISON: This is Mr. Allison, Your Honor.  
9 Essentially, you are correct. It was a little unclear to us,  
10 Ms. Gasparri is the airport director, and whether she was acting  
11 as -- in an official capacity within the purview of a  
12 Section 1983 equal protection clause. So that is why we added  
13 her; and AvPorts, who was the one who sent us the letters, our  
14 clients the letters informing them of the County's policies  
15 initially. We told Mr. Foont when we were contacted by him this  
16 week that we would quickly consider his request and get back to  
17 him, but that we had the pressing business of the TRO and  
18 certainly would consider that.

19                   So we want to look at that carefully and make sure we  
20 make the right decision, but I think that Your Honor's  
21 suggestion that we may be able to reach a resolution and get  
22 them out of the case is -- it may be correct.

23                   THE COURT: All right. I don't know who wants to  
24 speak. Mr. Nonna, good morning. Mr. Chen. What's the  
25 situation with these two defendants?

1                   MR. CHEN: Your Honor, this is Dave Chen on behalf  
2 Westchester. What you said is correct. They are our agents.  
3 AvPorts operates the airport for the County. Ms. Gasparri is  
4 the -- is an AvPorts employee, and she has the title of airport  
5 manager or director, but for all intents and purposes, she and  
6 AvPorts are purely our agents in here. Her involvement, yes,  
7 she signed Policy Number 1, which was promulgated on  
8 January 21st, but that's just, again, in her capacity as the  
9 airport manager. She is acting on behalf of the County in that  
10 regard.

11                  THE COURT: Okay. So the first order of business,  
12 Mr. Allison, Mr. Foont, and Mr. Chen, you are going to meet and  
13 confer, and you are going to let me know -- well, we will fix a  
14 date in a moment because you are going to have several topics  
15 that you are going to meet and confer about. But please do this  
16 promptly. I don't want Mr. Foont's law firm engaged here unless  
17 it's necessary. If it's necessary, then of course, Mr. Allison,  
18 they remain subject to a proper motion to dismiss; but the  
19 instinct that I have is that the individual and the entity are  
20 nothing more or less than players without regard to the ability  
21 -- without regard to their signing things that they are not  
22 necessary parties, and so I am going to ask the three of you to  
23 meet and confer.

24                  I am also going to instruct that -- Mr. Allison's  
25 entitled, Mr. Chen, on some basis, he has clients -- he is

1 entitled to understand their role in some way, shape or form. I  
2 am not looking to create discovery. I am directing, however,  
3 that if there is a piece of paper or pieces of paper, and they  
4 may need to be redacted for whatever reason that satisfies  
5 Mr. Allison, if he needs it, of their role, then I am directing  
6 you to produce them immediately. Am I clear?

7 MR. CHEN: Yes, Your Honor.

8 THE COURT: All right. Terrific. So that's one  
9 issue.

10 Now, another issue -- and I am glad to see our County  
11 Attorney, Mr. Nonna, is on the call. I have looked at two  
12 letters from the County that were uploaded here. One is  
13 Document 21, one is Document 29, and I am trying to be practical  
14 here. As you will see in a minute, I approach these things from  
15 a practical point of view.

16 The County has indicated to me that they have not  
17 interfered with the plaintiffs' flights, nor will they do so  
18 without a valid order, and they have also indicated to me that  
19 they will not take, and have not taken, any action to affect  
20 their operation, "their" being the plaintiffs' operations at  
21 Westchester County.

22 So having said that to each other, what I would like  
23 to do is have you stipulate that you will continue to abide that  
24 until some other event.

25 Is there a problem with that, Mr. Nonna?

1                   MR. NONNA: No, Your Honor. That's why we started the  
2 lawsuit. We weren't going to exercise any self-help enforcing  
3 the policy or the terminal use regulations without getting  
4 approval by the -- by a court without an adjudication that they,  
5 in fact, apply to these specific charter operators.

6                   THE COURT: All right. So, Mr. Allison, what I am  
7 proposing is that we stipulate, and that you and Mr. Chen and  
8 Mr. Nonna enter into an order and stipulation that I will sign  
9 that reflects this language. We are not going to get into the,  
10 Mr. Allison, the -- you're temporarily enjoined and restrained;  
11 we are not doing that. What we are going to do is we are going  
12 to seize upon the language that the County has offered and enter  
13 into an order and stip that the County will not interfere with  
14 these flights and will not do so without a valid court order;  
15 and that they will not, have not taken any action to affect  
16 plaintiffs' operations at the county airport without further  
17 court order, I assume, Mr. Nonna.

18                   MR. NONNA: Yes.

19                   THE COURT: Now that eliminates, from my seat, a whole  
20 variety of problems that are practical.

21                   Mr. Allison, do you have any issue with this?

22                   MR. ALLISON: Your Honor, there is one rather  
23 significant issue that I would -- that I would suggest that we  
24 need to address by this stip and order procedure that you have  
25 outlined.

1           The County has, in fact, taken what we would consider  
2 to be some level of self-help here. The County has sent letters  
3 to the fixed-base operators or FBOs, which are the facilities at  
4 the airport that we operate out of --

5           THE COURT: Right. Cease and desist letters.

6           MR. ALLISON: Right. And these third parties, which  
7 are essential to our business, have been essentially asked to,  
8 you know, enforce that policy. I would suggest that the stip  
9 and order needs to include that there is no further action, and,  
10 in fact, that these FBOs be informed that those letters are of  
11 no force and effect, at least at this point; that they are not  
12 being asked to take any action to effectuate the County policy  
13 because we are gravely concerned that these third parties might  
14 view that they -- that their -- it's in their interest or that  
15 they are concerned about whether they need to do something in  
16 light of those letters.

17           So I would suggest that we have to add that into this  
18 to make sure that there is no sort of, I guess --

19           THE COURT: I don't think --

20           MR. ALLISON: -- indirect issue.

21           THE COURT: I don't think, Mr. Allison, I am going to  
22 direct anybody to withdraw their cease and desist orders, but as  
23 a practical matter, Mr. Nonna, Mr. Chen, is there any issue with  
24 this? In other words, what I think I am hearing is: They just  
25 want to be sure, the plaintiffs just want to be sure that --

1 these are non-parties, Mr. Allison? Is that what you are  
2 saying?

3 MR. ALLISON: They are. They are, Your Honor. They  
4 are not parties to any of the proceedings either in state or  
5 federal.

6 THE COURT: So that the same applies to parties and  
7 the recipients of the cease and desist letters; is that it?

8 MR. ALLISON: Your Honor, that is our concern.  
9 Correct.

10 THE COURT: All right. Now --

11 (cross-talk)

12 THE COURT: Mr. Nonna, Mr. Chen, that doesn't seem to  
13 be anything unreasonable at all, does it?

14 MR. CHEN: No. We will provide the FBOs with the  
15 stipulation and order as well. So they will see the County --

16 THE COURT: Mr. Allison's point, he is being careful,  
17 as he should. He is saying that this order and stip applies to  
18 the parties hereto and the nonparties who have received the  
19 County's cease and desist orders.

20 MR. NONNA: Yes.

21 THE COURT: Okay. Terrific. So we are past the TRO.  
22 We are past the problems. Hopefully Mr. Foont will be in and  
23 out of here very quickly. But now -- and so you are going to  
24 get this to me immediately. I would like it today if it's  
25 possible. If it's not possible today, I would like it on Monday

1 so that I can so order it, and we can move on.

2 Now, the next problem here, practical problem that  
3 exists in my mind is, Mr. Allison, your action came subsequent  
4 to the County's action, and I get it. Before I was so  
5 privileged and lucky as to be on this side, I was on your side  
6 for 40 years, and I perfectly understand lawyers wanting to  
7 guide their own issues, number one.

8 Number two, as I understand it, you know, we have had  
9 plenty of time back and forth, the County even announced that  
10 they were authorized to bring an action somewhere in early  
11 February, and so they got ahead of you and whatever it is, I get  
12 it. But now we've got to be practical for each other, and as I  
13 understand the situation, the state court action is in front of  
14 Judge Lubell, a fine Supreme Court justice, and he has scheduled  
15 a preliminary injunction hearing for April 8th, and now you've  
16 got me. We've got an order and stip already in place, so we  
17 don't have to worry about injunctions or anything else, but I  
18 have a legitimate concern here. I don't want to do this if  
19 Judge Lubell is doing it. I don't think that's appropriate. I  
20 know everybody, I guess, would like to be in a federal court  
21 sometimes for one reason for another, but I don't -- why can't  
22 -- why can't you, Mr. Allison, take your preemption issues,  
23 which, as we both know is primarily a defense, I realize you  
24 have the ability. You are properly citing case law that says,  
25 Judge, I can do this as an affirmative claim. The Second

1 Circuit says I can, and so that's good enough for me. I get it.

2 But let's be practical with each other for a minute.

3 You are getting a hearing in front of Judge Lubell. Preemption  
4 is a perfectly legitimate defense to the claims made, and you  
5 can even make counterclaims; and further, you have a perfect  
6 right to bring your 1983 claims, right, into a state court. So  
7 why do you need to be here in front of me?

8 MR. ALLISON: Well, Your Honor, I think there is a  
9 couple answers to that question, and I will try to be brief.

10 First, and let me say this very clearly on the record,  
11 nothing of what I am about to say is meant with any level of  
12 disrespect to Judge Lubell. I agree with you, a fine jurist.  
13 But these actions, both of them, unquestionably raise issues of  
14 federal law. There's no issues of state law, and as a matter of  
15 fact, if you read the complaint that was filed in state court,  
16 the plaintiffs -- the County concedes that the issues are  
17 federal law. And the Second Circuit has said in *Yule* (ph) and  
18 many other cases that resolving novel issues, questions of  
19 federal law are quintessentially the obligation of federal  
20 courts. That's why the abstention doctrines that we went  
21 through are pretty clearly inapplicable when federal law  
22 supplies the rule of decision, and that's where we are here. So  
23 that is why we want to be in a federal court.

24 Again, I don't disagree with you, Your Honor, that you  
25 can raise preemption as a defense in state court. That, of

1 course, is true. But the reason that we want to be here is  
2 because we are raising federal law issues. Just the same way  
3 that if it was a state law claim, that the *Wilton* abstention  
4 doctrine that the County raises would be applicable, and state  
5 court would be more likely to be the appropriate place for that  
6 case when you have two courts that have taken jurisdiction.

7 So that's the -- that is the fundamental reason that  
8 we want to be in front of Your Honor.

9 THE COURT: Well, I mean, let's talk about this for a  
10 minute because it may be from your seat that abstention is  
11 inapplicable here, but I am not -- I am not saying it is or  
12 isn't, but it's certainly on my mind, and it's certainly  
13 something you are going to both brief for me; but let me just --  
14 you know, let's step away from this for a second.

15 The regulation -- you will forgive me, I am saying  
16 regulation -- but 712.462, that showed up in the -- on the  
17 planet in 2004, and it's pretty clear, pretty straightforward.  
18 And then, as I get this scenario, the -- I don't know what you  
19 would call this, I guess Policy Number 1 is what we will call  
20 it, came out on January 21, 2022; and then the County decided  
21 that it needed to, according to the resolution, commence an  
22 action at the end of January 2022, and they then went and  
23 commenced an action; and now it's March 11th, and you have  
24 decided, Mr. Allison, for whatever reason to commence your  
25 action. And I am saying, well, I don't know. I don't feel any

1 urgency, and why on the 10th of March is this now all of a  
2 sudden some kind of preempted conduct? The -- I just don't -- I  
3 don't get it. I mean, it would have been preempted back in 2004  
4 when the reg was issued. It would have been preempted in --  
5 according to you -- on January 21 when the policy was issued,  
6 but what all of a sudden makes it an urgent March 10th issue for  
7 me?

8 MR. ALLISON: Sure. And, Your Honor, let me address  
9 that because I understand from your perspective, Your Honor, how  
10 it may look that way, but hopefully I can give you the timeline,  
11 and it will make it more clear.

12 THE COURT: Yes.

13 MR. ALLISON: In 2004 when the policy -- the TUP or  
14 the terminal use procedures were adopted, the municipal code you  
15 reference, our client's business model didn't exist. We weren't  
16 operating. So the three of us were not operating then.

17 But more importantly, from 2004 until late in 2021,  
18 November, the County and the airport never enforced or  
19 interpreted that policy the way they started to in November. In  
20 fact, in the declarations that we filed, two of our clients,  
21 Blade and XO, had been providing these services at the airport  
22 since 2015 and without a peep this was a problem or violated the  
23 terminal use procedures that were in 2004. So it wasn't until  
24 November, late October, early November that we started getting  
25 indications from the County that they were going to start to try

1 to interpret the TUPs or the 2004 statute in that fashion.

2 Our clients appropriately have been negotiating with  
3 the County, meeting and conferring with them, trying to find out  
4 a way to resolve this issue. Then in January was the first time  
5 that the County put an official policy in place, this Policy  
6 Number 1, that says these terminal use procedures, the way they  
7 now interpret them, apply to single-seat charter operators, a  
8 new category that they invented to encompass just our clients,  
9 not other type of charter operators operating --

10 THE COURT: That's the nine-seaters, right? It's the  
11 nine-seaters and more, and the problem that they are having -- I  
12 don't mean to interrupt, but I guess I need to for a second.

13 MR. ALLISON: Sure.

14 THE COURT: -- is that the business models have  
15 changed: Covid and/or there are more people able to fly or less  
16 people, more people desirous of staying out of the crowds,  
17 whatever it is. I don't know what it is. Maybe we have more  
18 rich people who can afford these services or the services  
19 pricing has come down. Look, I don't really care what got us  
20 here. But I think, in fairness, I don't think the County is,  
21 you know, taking potshots at its customers because ultimately  
22 you're customers of the County as I get it. I don't think they  
23 are doing that. I think what they are doing is they are  
24 reacting to an economic model change.

25 Now let me interrupt, as long as I have, Mr. Allison.

1                   Mr. Chen, am I -- is that correct or incorrect?

2                   MR. CHEN: I think that's absolutely correct, Your  
3 Honor. This is Mr. Chen.

4                   THE COURT: So -- and the other feature about this  
5 that is of concern to me is you're -- you two, both sides of you  
6 are drawing lines with each other a little bit in a customer  
7 relationship umbrella. Am I wrong, Mr. Allison, that really on  
8 some level you are a customer of the County or am I looking at  
9 it inappropriately?

10                  MR. ALLISON: I don't know that that's the right  
11 phraseology. We are operating a federally approved -- and this  
12 is a really important point. You know, aviation is a federal  
13 concern. It is very clear under the ADA and ANCA that this is a  
14 federal concern, and there is very broad and significant  
15 preemption provisions. So this is not something -- so our --

16                  THE COURT: I read your brief. I read your brief.

17                  MR. ALLISON: Our services are federally approved. So  
18 we are approved to do so first and foremost through the federal  
19 government, and then that allows us, gives us access to the  
20 airports, not just this airport but for a whole variety of  
21 airports around the country. And so -- and so we are not a  
22 customer of theirs in that sense. We are permitted to have  
23 access to it as part of a federal aviation policy, and we have  
24 complied with that, and therefore, we are allowed access.

25                  In some sense we are a customer of the fixed-base

1 operators because that's where we have to operate out of, but  
2 that is -- those are not County entities. That's truly who we  
3 are -- if you want to think of it as a customer, that's who we  
4 are a customer of. We are not a customer of the airport in that  
5 sense.

6 THE COURT: And are the FBOs customers of the County?  
7 Who is the customer? The --

8 MR. ALLISON: I am sorry. I am sorry. I didn't mean  
9 to interrupt. I think the FBOs have typically -- and I haven't  
10 studied their contracts in this particular instance yet -- but  
11 typically, they have some sort of a lease arrangement or -- with  
12 the --

13 THE COURT: I get it.

14 MR. ALLISON: -- with the -- but again, the airport  
15 takes federal funds and has to allow us to have access to the  
16 airport.

17 THE COURT: No, no. I get it.

18 (Cross-talk)

19 MR. ALLISON: -- those funds.

20 THE COURT: I don't want to talk about whether this is  
21 preempted, this policy is or regulation is preempted or not. I  
22 don't want to talk about that right now.

23 MR. ALLISON: I got it.

24 THE COURT: What I want to talk about is the business  
25 relationship that is extant, and in the wide variety of

1 materials that you forwarded to me there was one letter that  
2 sort of got my attention from The Wicks Group that was sent to  
3 Jet Law, and the gravamen was, look-it, we want to talk and try  
4 to solve this problem with you and with your advice and consent  
5 if possible.

6 Tell me, Mr. Chen, how far along has that process  
7 gone?

8 MR. CHEN: Well, Your Honor, so The Wicks Group is our  
9 aviation counsel. Obviously, anything involving the airport,  
10 you know, involves a lot of aviation regs, and there's a lot of  
11 (inaudible), so we hired them and have hired them to represent  
12 our interest in that matter. And that was -- a lot of the  
13 communications, as you noted, that have taken place over the  
14 last six or so months have been between our aviation counsel and  
15 their aviation counsel. There have also been some between  
16 AvPorts and the plaintiffs directly.

17 And I think, you know, what started to become clear is  
18 that, you know, we just had a disagreement specifically over  
19 whether our local law was -- could be applied to them and/or,  
20 you know, for their position whether it would be preempted by  
21 these federal regulations.

22 So we -- I think we kind of took it as far as we could  
23 go, and unfortunately, this litigation was -- was the result,  
24 but I mean, I think it's worth mentioning two things: You know,  
25 one, as I think you have seen, you know, we are not -- certainly

1 not trying to take the law into our own hands. We have been  
2 trying to do this the right way. You know, we've been very  
3 clear in our intentions all along and, you know, initiated an  
4 action in state court, which we felt was the appropriate issue  
5 to resolve a question of really local law.

6 And two, I think the other thing that bears mentioning  
7 is that, you know, this idea that we have sort of singled out  
8 the plaintiffs, or the defendants in our case, is really not  
9 true. I mean, one of the reasons we promulgated the policy on  
10 January 21st was to make very clear that no one was being  
11 singled out; that this was the policy, and it was being -- and  
12 this was published to everyone. And it's worth mentioning there  
13 are other Part 30 -- 380 operators, you know, similarly situated  
14 to plaintiffs who are not -- who are in compliance with our  
15 local law and therefore were not named as defendants. So, I  
16 mean, they are only being singled out in that sense in that they  
17 are the ones that have refused to comply.

18 THE COURT: Take me through a minute, if you don't  
19 mind, Mr. Chen, explain to me, if you don't mind, in brief  
20 terms: What's the point here? What's the problem? And what is  
21 the Policy Number 1's solution to the problem?

22 MR. CHEN: Sure, Your Honor. So I guess in the  
23 30-second version is that --

24 THE COURT: You can have a minute.

25 MR. CHEN: I will take the full minute. There is

1 obviously the big-time airlines you would think of that most  
2 people fly commercially: American, Delta, et cetera. You know,  
3 those fly out of -- those are publicly available, and as such,  
4 they are required under local law, and they do, fly out of the  
5 terminal pursuant to a terminal use agreement.

6 Private charter planes have always been exempted from  
7 that. So if a basketball team wants to charter a plane, usually  
8 a smaller one, or a business wants to charter it, they are  
9 not -- they are not bound by the same requirement. They can  
10 charter a private plane, and they can fly it out of an FBO with  
11 no issue.

12 And then so as the paper sort of sets forth, this new  
13 business model started to emerge a few years ago and really sort  
14 of came to a head in just the last couple of years, probably  
15 accelerated by Covid, where companies like the plaintiffs have  
16 sort of, you know, done a little bit of a hybrid. They  
17 essentially charter planes privately, but then they sell  
18 individual seats on those planes to the public; and our opinion  
19 is that that brings them under the rubric of our local terminal  
20 use procedures, and they disagree, and that's really the dispute  
21 here. It's fundamentally, we think, a question of  
22 interpretation of local law, and that's why we brought it in  
23 state court. It didn't seem like something to bother the  
24 federal courts with.

25 Now, we get it. Obviously --

1 (Cross-talk)

2 THE COURT: Just let me interrupt. What's the  
3 business of the nine seats? What is that about?

4 MR. CHEN: That -- I am not frankly sure where that  
5 original number came from, but that's been there since the 2004  
6 law was passed. It's just a way to distinguish, as far as I  
7 understand, smaller planes which are the kind that are typically  
8 operating from the FBOs from the larger ones.

9 THE COURT: If you're selling seats on a plane that  
10 has nine or less seats, you are exempt?

11 MR. CHEN: Correct.

12 THE COURT: And if you are selling seats on a plane  
13 that has nine or more, you are not exempt?

14 MR. CHEN: Correct. Selling them publicly, Your  
15 Honor. That's --

16 THE COURT: Yes, selling seats publicly. Okay. All  
17 right. I get it.

18 Mr. Allison, why can't this problem be solved? Why  
19 can't you guys come up with a solution? You're smart. You're  
20 capable. Why can't we -- why can't we get everybody we need to  
21 get in a room and figure this out? I mean, I get it. You don't  
22 want to go to the terminal, and you don't like -- your clients  
23 don't like having to deal with the terminal, the lack of privity  
24 or privacy, the TSA, public checkpoints. I get it. I get it.

25 But there's got to be a way here for the County and

1 your clients, I assume, I guess, along with the FBOs, to come up  
2 with a solution. Isn't there -- why do we have to draw lines in  
3 the sand with each other so that you've got two judges right now  
4 looking at the same problem. Why do we have to do it that way?  
5 Why can't we direct that we try to come up with a business  
6 solution where nobody wins 100 percent, everybody loses a little  
7 bit in the hopes of solving a problem?

8 This appears, according to Mr. Chen, to be a new issue  
9 that has arisen, and maybe it's not a new issue. Maybe your  
10 answer would be: No, no, no, we have been doing the same thing,  
11 but it's now more frequent. It's more pronounced. There are a  
12 lot more people flying, buying tickets over the Internet and  
13 flying out. Why can't we figure this out?

14 MR. ALLISON: Your Honor, let me address that in two  
15 parts, and I am going to get to your practical question second  
16 because there is a reason why, to answer your question, you keep  
17 saying why and then what about the practical?

18 And the "why" is it that, frankly, listening carefully  
19 to what Mr. Chen just said, he described this as an issue of  
20 local law. That is definitively not true under the Airline  
21 Deregulation Act and the Airport Noise and Capacity Act. It  
22 just is not a local legal issue. It is a national federal  
23 issue. Congress has decided this repeatedly. So that I think  
24 is where we are at a little bit of loggerheads as what decides  
25 because our method of doing business, new or not, is federally

1 approved, and is in many other airports throughout the country.

2 So this is not -- this is not as novel or a new a  
3 thing as it sounds, but even if it is new, that's irrelevant  
4 because, again, it was federally approved; and part of the  
5 reason for the Airline Deregulation Act -- it says it right in  
6 the purposes of it -- is to allow -- the market to allow new and  
7 innovative forms of transportation, air transportation to exist.  
8 That was why under President Reagan the deregulation happened  
9 those many years ago. So while that may seem like ancient  
10 history, it's important because that's why these statutes exist  
11 to avoid local regulation, local laws trying to tell national  
12 air carriers you can't do this. That's exactly the point.

13 THE COURT: Mr. Allison, you're right or you're wrong.  
14 I don't know.

15 MR. ALLISON: Right.

16 THE COURT: But the County is pointing to the local  
17 regulation 712.462, and it's saying to me, this is a local  
18 issue; and you are saying to me, much like your complaint does,  
19 Your Honor, this is preempted by federal law. I got that.  
20 That's what got you here.

21 MR. ALLISON: Okay.

22 THE COURT: I get it, and you're adamant and they're  
23 adamant. I am good with that. I like adamant lawyers, and I  
24 love my job, and I am delighted to be here, and if I keep this  
25 case, I will have to figure this out. So I get all of that.

1 Let's put all of that to the side now. You've got --

2 MR. ALLISON: Okay.

3 THE COURT: -- an airline business that apparently is  
4 booming, and the County's running an airport through its agents,  
5 and they are saying, no, no, no. You can't do this. It's a  
6 business proposition before it's a legal proposition. The  
7 legal --

8 MR. ALLISON: Absolutely.

9 THE COURT: -- proposition is on the table. I got it.  
10 I am going backwards. I'm saying, I got it. You know, I am not  
11 an airline -- an air deregulation specialist. I hope you all  
12 realize that, and I hope you also realize by my questions I am  
13 eager to understand, and I am a pretty good study of things, so  
14 I will get it, but I do need to be educated on this. I get all  
15 of that. But this is a business that your clients are running  
16 and that the airport is running, and I am raising my hand and  
17 saying, can we get to the business solution possibility here  
18 before we get to the preemption possibility?

19 MR. ALLISON: Yes, Your Honor.

20 THE COURT: That's what I want to talk about.

21 MR. ALLISON: And that was going to be my second  
22 point, Your Honor. We have --

23 THE COURT: I get it.

24 MR. ALLISON: We have absolutely attempted to do that.  
25 The CEOs or presidents or general counsels of all three of my

1 clients have actively been involved in attempting to reach  
2 resolutions that allow -- so this is very important -- that  
3 allow their federally-approved business to continue to operate  
4 in the way in which the federal government has said it can  
5 operate, yet try to find creative solutions.

6 To date, the creative solutions that have been  
7 proposed have been rejected almost without comment. I won't go  
8 through the details of them unless Your Honor wants me to  
9 because I think that probably gets into the weeds a little bit  
10 and maybe turns it into a frog.

11 THE COURT: I don't need that. I don't need that.

12 MR. ALLISON: But let me tell you, we have done that,  
13 and that is the reason why in part we had not filed our lawsuit  
14 as of now because they were trying to find business solutions,  
15 and, you know, as much as I believe they like talking to me,  
16 they would rather not hire me, and so --

17 THE COURT: All right. Mr. Nonna, Mr. Chen -- and I  
18 don't -- I don't want you to, you know, on an adversarial  
19 call -- not with me, of course, but with the adversaries -- I  
20 don't want you to say anything inappropriately, but my question  
21 is: Wouldn't it be better, wouldn't it be more appropriate at  
22 this juncture now that you've both lawyered up and lawnsuited up,  
23 and you are all ready to go, and you are all teed up, wouldn't  
24 it be better to pause this scenario for a minute or a brief  
25 period and try to see if there any opportunity to resolve this

1 amicably now?

2 MR. NONNA: Your Honor, this is John --

3 MR. CHEN: I am sorry. Go ahead.

4 MR. NONNA: You go first. Go ahead.

5 MR. CHEN: I was just going to say -- and look, I  
6 wasn't directly involved in most of the negotiations, but we --  
7 you know, we made what I think was a pretty significant  
8 concession, which was that, look, as per your incoming flights  
9 that follow this model, if you want to bring those into the  
10 FBOs, that's fine. So, you know, it's only the outgoing flights  
11 that we really felt like we had to draw a line on, and we felt  
12 like that was a pretty significant concession, and it was  
13 rejected.

14 So, I mean, we certainly did try, and really we kind  
15 of just kind of kept running up to the same issue, which is that  
16 ultimately the plaintiffs feel that, you know, our law can't be  
17 applied to them.

18 The only other point I wanted to make, and then I will  
19 turn it over to the county attorney, is you know, this specter  
20 of violating federal law keeps getting raised. Our 2004 law was  
21 vetted by the FAA. This is part of our state court complaint,  
22 and they said that we were grandfathered in. So this is not an  
23 issue, actually, that you will see around the country. We're --  
24 Westchester is in a bit of a unique position here because we  
25 have this local law that was grandfathered in and approved by

1 the FAA. So, you know, this idea that we're somehow in  
2 violation of federal laws is really a bit much.

3 But look, as we noted in our own complaint, they  
4 obviously have a defense that there is some preemption here, and  
5 we are fully prepared to address that in the state court action.

6 THE COURT: Yeah.

7 MR. NONNA: So let me just add that the discussions  
8 have kind of came to a halt because there was no response to  
9 several of the final letters. There was a final letter from  
10 JSX, I believe, that basically rejected the County's approach  
11 completely, but I think Mr. Chen made a good point. We kind of  
12 gave halfway by saying you could bring your flights into the  
13 FBOs. The issue is really getting a ramp allocation for  
14 departing flights, which was an important and probably the most  
15 important part of the TUR is to control by ramp allocation  
16 departing flights for larger planes that seat more than nine  
17 people.

18 So maybe there could be further discussions about  
19 that. I know one of the things -- and I don't want to get into  
20 the weeds -- but I tell you there was efforts to try to resolve  
21 that part, too. I think one of the charter operators wanted to  
22 bring a bus in from the FBOs to board the flight at the ramp  
23 allocation. I think we determined -- the County determined with  
24 AvPorts's input that that created some safety problems with  
25 buses traveling back and forth between FBO and the terminal. So

1 efforts have been made. I don't think it's a fair to say the  
2 County turned a blind eye to try and accommodate -- accommodate  
3 the charter operators.

4 THE COURT: From what I am hearing, Mr. Nonna, is that  
5 with respect to incoming flights, you were willing to let the  
6 business remain as it is. With respect to outgoing flights,  
7 that's where the issue became an issue, and moving people by bus  
8 didn't work.

9 Is there other options, Mr. Allison? I mean, this  
10 feels to me like -- listen, lawyers are a wonderful breed of  
11 human being. Lawyers -- I am a lawyer before I was a judge, and  
12 I truly get it and, you know, drawing lines in the sand and  
13 preemption is preemption. I just -- and then of course the  
14 County will in its papers let me know that, you know, this is  
15 not preemption. It doesn't apply. The rules don't apply to  
16 this, et cetera. I will get you a ruling as quickly as I can.  
17 I don't know whether I need an evidentiary hearing on your  
18 injunction or not, and frankly, I don't even know whether I am  
19 going to take this case because of the abstention issues. I'm  
20 not saying I am. I'm not saying I am not. I am saying I need  
21 to be educated on that.

22 So while you are doing all of that work, is it just  
23 that this is a matter of principle now; that there is no way for  
24 business people to fix this problem of getting people on a  
25 charter airplane in a comfortable way that makes both the

1 clients, the customers happy and the County? I mean, I struggle  
2 with it.

3 MR. ALLISON: Your Honor, let me -- and I think we  
4 have talked around it a little bit, but the fundamental issue is  
5 the insistence by the County that we use the TSA security, you  
6 know, the typical TSA security clearing system, and that our  
7 passengers move through that. It's what's called a SITA versus  
8 a non-SITA -- not to turn you into an aviation lawyer today --  
9 but that distinction is absolutely critical to our business  
10 model that was federally approved, and by the way, and the TSA  
11 has approved it.

12 Now, to be clear, we have a TSA screening process. I  
13 want to make that very, very clear. It's called the Twelve-Five  
14 protocols approved by the TSA. The TSA is very happy with the  
15 way we do that. We are audited by them. They make sure we do  
16 it right. So but that -- the County has insisted, and has not  
17 moved off that insistence, that our passengers move through the  
18 TSA security system, and that would effectively turn us into  
19 American or Delta or Southwest or whichever one you want to  
20 pick, and that is not our business model, and the federal  
21 government has not said we have to do that. And that is -- it's  
22 not the only issue, but it is certainly the crux of the issue;  
23 and that is where I believe -- and again, I wasn't involved in  
24 all of the back-and-forth early on -- but I believe that is the  
25 rocks on which we have -- you know, the ship has, you know, gone

1 aground.

2 THE COURT: I understand.

3 MR. ALLISON: And so that, you know, just to let Your  
4 Honor know that's the issue, I think the biggest issue.

5 MR. CHEN: Just a very brief point (inaudible). It's  
6 Mr. Chen. You know, speaking of American and Delta and JetBlue  
7 and those other airlines, I think that it's really important to  
8 remember, it's not that the County is standing on principle  
9 here. It's really that we take our obligations, our FAA  
10 obligations, you know, to treat everyone equally very seriously,  
11 and if we didn't attempt to enforce our law as to the  
12 plaintiffs, then we would open ourselves up to the other  
13 commercial airlines like American, like Delta, like JetBlue  
14 saying, hey, why don't we do the same thing? We will charter an  
15 entire plane, but sell the individual tickets publicly and  
16 operate it out of the FBOs instead of out of the terminal?

17 You know, it's not so much I think us standing on  
18 principle or just being stubborn or drawing a line in the sand.  
19 This is our attempt to comply with our federal requirements to  
20 treat everyone the same.

21 THE COURT: Can't we solve the TSA problem, though,  
22 with these folks, Mr. Chen?

23 MR. ALLISON: Your Honor -- I am sorry. I will let  
24 Mr. Chen speak.

25 MR. CHEN: That I am not -- I am not -- this is a

1 little bit more technical, I think, than I am prepared to brief,  
2 Your Honor. I mean, my understanding -- and Mr. Nonna may  
3 correct me -- is our issue, it's not about TSA checkpoints.  
4 It's about the use of the terminal. Now, obviously, the TSA  
5 checkpoints are in the terminal, so there is some overlap, but I  
6 -- I think that's -- that's the real hang-up there, but I don't  
7 want to speak out of turn. This is -- that is not my area of  
8 expertise.

9 (Cross-talk)

10 MR. NONNA: We have -- I am sorry, go ahead,  
11 Mr. Allison.

12 MR. ALLISON: No, go ahead, Mr. Nonna. I certainly  
13 wasn't trying to interrupt anybody.

14 MR. NONNA: Your Honor, I am not -- I am not going to  
15 add to what Mr. Chen said. I can't answer that question,  
16 either.

17 THE COURT: Okay. All right. Look, I am pushing a  
18 little bit, as you have noticed. We have accomplished a couple  
19 of things for each other, which is, we are going to do an order  
20 and stip. You are going to get back to me no later than  
21 5:00 p.m. on Monday. Stick with the language of the letters.  
22 It includes the individuals or entities that received cease and  
23 desist letters so that they are comfortable. You will meet and  
24 confer about AvPorts, LLC and Ms. Gasparri.

25 I am not going to address the TRO because I don't need

1 to, and I'm happy to give you a briefing schedule. I need you  
2 to oppose. I will sign the order to show cause. By the time  
3 the County gets its time, and you get your reply time, you know,  
4 we are going to be past April 8th. So I am trying to be  
5 practical to save the both of you --

6 MR. ALLISON: Your Honor, this is Mr. Allison. I  
7 didn't mean to interrupt, but I did want to say something that I  
8 hadn't mentioned before. We are intending to, and will do so  
9 next week, move to stay the state court action in deference to  
10 this action. So I didn't want anybody to be surprised by that,  
11 and I apologize, Your Honor, that I didn't mention it earlier.

12 THE COURT: Yeah, I mean --

13 MR. ALLISON: We do intend to do it.

14 THE COURT: You do whatever you need to do. I am not  
15 going to be rushed or not, and very honestly, you are going to  
16 have to brief this issue quickly for me on abstention. I am not  
17 at all convinced that given the nature of the claims here, and  
18 the nature of the action pending, and your rights under the  
19 C.P.L.R. and the state court to address all of the issues here.  
20 I, frankly, I don't know yet how I feel, but I am struck by the  
21 notion that this unconstitutional provision that's been around  
22 since 2004, that the County says it's going to prove by the FAA  
23 and everything else, and it may not be such an urgent necessary  
24 federal question that I need to address it.

25 So I don't know how I feel about it, and please don't

1 infer one way or the other that I am committing to my thinking,  
2 but I am raising my hand and saying very sincerely, you know,  
3 you do whatever you need to do, Mr. Allison, but I don't really  
4 care about what procedural steps you decide to take. When I am  
5 ready, I will let you know whether I am going to keep this case  
6 or not, and so do whatever you think you've got to do.

7           But my point now is, you have an order to show cause  
8 for preliminary injunction. You know, you're looking for  
9 ultimate relief, by the way, Mr. Allison, and so let's be really  
10 clear. I am a burden-of-proof person, and when you are looking  
11 for ultimate relief in a preliminary injunction, the standard of  
12 review by the district court judge is significantly higher than  
13 otherwise, and so just be guided accordingly.

14           So I am going to need -- and I don't know whether you  
15 want to take a first crack at supplemental briefing on the issue  
16 of abstention or you think you can handle it. We are not going  
17 over the page limit, so that's not going to happen. You can do  
18 it in reply. I assume the County is going to oppose and ask me  
19 to abstain and dismiss this action.

20           Am I right about that, Mr. Chen?

21           MR. CHEN: That's correct, Your Honor. And I am just  
22 I am wondering if it would make cleaner if we can just limit  
23 further briefing to this issue of abstention? I mean,  
24 obviously, it's up to you, but I am just wondering. It seems  
25 like --

1                   THE COURT: I am not going to let -- the plaintiff has  
2 made an application for a preliminary injunction. I, frankly,  
3 was hoping I would hear -- but I haven't yet heard -- that that  
4 motion is going to be withdrawn given the order and stip that we  
5 have entered into. I actually think the order and stip would be  
6 better than the preliminary injunction exercise, but maybe  
7 Mr. Allison will reflect on that and decide he doesn't need this  
8 application for a preliminary injunction anymore. And but he  
9 hasn't said that, so I don't know. Maybe I should put him on  
10 the spot.

11                   Mr. Allison, what do you think?

12                   MR. ALLISON: I think, Your Honor, that I would like  
13 to discuss that issue with my clients and certainly will do so  
14 quickly, and if we decide to withdraw, we would let everybody  
15 know immediately, but I --

16                   THE COURT: By Monday at 5:00 would be the time I  
17 would insist that you tell me.

18                   MR. ALLISON: That's fine, Your Honor.

19                   THE COURT: That would then leave a nice clean, neat  
20 abstention issue for us to consider, and I think that that's the  
21 main event here for the moment, and I think you both want an  
22 answer from me as quickly as time permits, which, you know, I  
23 will give you as quickly as I can.

24                   But I think in the interim what I am going to do,  
25 Mr. Chen, is we are going to -- Mr. Allison is not prepared --

1 and I don't blame him -- to withdraw. I pushed everybody I  
2 think as far as I can push everybody for this conversation, and  
3 I will leave some more pushing thoughts for another conversation  
4 that we will have soon; but for the moment, you will let me know  
5 by 5:00 p.m. on Monday. The order to show cause is going to be  
6 withdrawn or not by 5:00 p.m. on Monday. If it is, so be it.

7 If it is not, Mr. Chen, what kind of time would you  
8 need to oppose the order to show cause, and how would you like  
9 to handle the abstention issue? I think what I would insist is  
10 you do an opposition brief and whatever documents, and then we  
11 will give plaintiff reply, and then I will permit each of you --  
12 and you will raise the issue of abstention in your opposition.  
13 I will give you a -- how much time do you need to do that?

14 MR. NONNA: Your Honor, this is John Nonna again. Is  
15 this to respond to the order to show cause for the injunction  
16 and address abstention in response to that as well?

17 THE COURT: Yup.

18 MR. NONNA: Okay. Got it. David -- (inaudible)

19 MR. CHEN: Judge, I am deciding how much of my March  
20 gets destroyed. I mean, if it would work for Your Honor, I  
21 mean, I think maybe two weeks, two to three weeks to draft an  
22 opposition if it was --

23 THE COURT: No. I am not -- I am not going to -- I am  
24 not going to get in the way of this. I will give you until  
25 Friday, April 1st to oppose, and your opposition will include

1 preliminary injunction, and you want to raise the abstention  
2 issue with me in those papers, I will accept that and permit  
3 that so that we are working on an expedient basis.

4 And then, Mr. Allison, on the issue of your reply,  
5 they are going to oppose, raise abstention. You are going to  
6 reply to the preliminary injunction and abstention by what date?

7 MR. ALLISON: We are -- given that we are the ones  
8 seeking quick relief, I think we would be hard pressed to argue  
9 for more than a week. So I think we could do it within a week  
10 or ten days.

11 THE COURT: Okay. I am happy to give you -- how is  
12 April 11th?

13 MR. ALLISON: That's fine, Your Honor.

14 MR. NONNA: Just to come back to one thing, Your  
15 Honor, if I may? In the event we are fortunate enough that  
16 plaintiffs decide to withdraw their order to show cause by  
17 5:00 p.m. on Monday, then we will only address the abstention in  
18 our briefs?

19 THE COURT: Yes.

20 MR. NONNA: Yes. Okay. Thanks.

21 THE COURT: Yes. That's the plan. And if they were  
22 to withdraw their preliminary injunction, then I would encourage  
23 that we could maybe advance the ball a little bit on abstention.

24 Is that feasible, Mr. Chen, or not given the  
25 County's --

1 MR. CHEN: No. That makes perfect sense, Your Honor.

2 THE COURT: Okay. So if there is no preliminary  
3 injunction motion, could you get me your abstention brief, no  
4 more than ten pages, by the 25th?

5 MR. CHEN: Yes, Your Honor. We can do that.

6 THE COURT: And could you, Mr. Allison, get me your  
7 opposition abstention brief, no more than ten pages, and I mean  
8 it, by April the 1st?

9 MR. ALLISON: Yes, Your Honor.

10 THE COURT: Okay. And so then I will be able to read  
11 those briefs. I may call you in. I may -- I don't know what I  
12 am going to do, but I am going to, assuming in this scenario the  
13 preliminary injunction order to show cause is withdrawn, I am  
14 going to accept the two briefs as to the County's request that I  
15 abstain and dismiss. Is that what you want, Mr. Chen?

16 MR. CHEN: Yes, Your Honor.

17 THE COURT: Okay. I don't think this is a bad plan.  
18 I think this is a good plan.

19 Mr. Allison, I would encourage you to consider, I know  
20 we have a lot, and a careful lawyer always has to think. I am  
21 going to sign your order to show cause. I am going to make it  
22 returnable on submission on the 11th of April, and we will give  
23 opposition due on the -- let's see, on the 1st. You will reply,  
24 it will be on submission on the 11th. I am striking the TRO,  
25 and we will go from here.

1                   Short of that, we will deal with the abstention issue  
2 by way of two briefs. I am trying to streamline this for both  
3 of you. You're anxious. You've got a lot going. I will try to  
4 get a decision to you very quickly on your abstention if I can.  
5 I will fit you in as best I can.

6                   Business is booming, by the way, in the Southern  
7 District. Our courtrooms are open. We are picking juries.  
8 Lawyers are coming in. It's really -- we are moving along here.  
9 So I will get to you as quick as I can.

10                  In the interim, don't feel like you can't talk to each  
11 other. I am going to insist at some point -- I am going to  
12 insist, just so you know, every case I participate in I require  
13 the lawyers to meet and confer. You can do it with a mediator.  
14 We can do it with a magistrate judge. You can do it on your  
15 own, but you are not off the hook on meeting and conferring  
16 about how you are going to solve this problem together because  
17 that's what ordinarily happens. Problems gets solved by smart  
18 lawyers. Once they beat their chests, draw their lines in the  
19 sand, write their pleadings; now you are in a litigation process  
20 where statistically most people resolve their problems, and I am  
21 hopeful that you will take that to heart at some juncture here  
22 and consider how to resolve this. I mean, this can be solved in  
23 many, many ways.

24                  All right. Mr. Allison, is there anything else I need  
25 to do? Of course, I assume we have no service issues here,

1 gentlemen. Everybody's got their papers. We don't need to --  
2 we don't need to get ticky-tacky with each other about service;  
3 am I right?

4 MR. NONNA: This is John Nonna. Yes, Your Honor. You  
5 are right.

6 THE COURT: Mr. Allison?

7 MR. ALLISON: Yes, Your Honor. I am not aware of any  
8 issues.

9 THE COURT: All right. Terrific. So we will get this  
10 under way, and to the extent if there is things that come up,  
11 you know, or you, God forbid, decide you want to start talking  
12 resolution, and I can steer you in a direction. I assume you  
13 don't want me in the middle, but it might be a magistrate judge  
14 or someone. All you need to do is write me. All right.

15 I look forward to working with you, assuming I am  
16 going to keep this case. I look forward to it. I think  
17 everybody on the phone has made it crystal clear to me that you  
18 know a hell of a lot more about this area of the law than I do,  
19 and so I am very interested in learning it and understanding it.  
20 So thank you for that.

21 All right. Anything else, Mr. Allison?

22 MR. CHEN: Thank you, Your Honor.

23 MR. ALLISON: No, Your Honor. Nothing from the  
24 plaintiffs. Thank you, Your Honor, for your time this morning.

25 THE COURT: All right. Mr. Chen? Mr. Nonna? You are

1 good?

2 MR. NONNA: We are good. Thank you very much, Your  
3 Honor, for your time.

4 THE COURT: Mr. Foont, you are good?

5 MR. FOONT: Yes, Your Honor. Thank you.

6 THE COURT: Okay. Take care, counsel.

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